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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**NORFOLK AND WESTERN RAILWAY COMPANY,**
*Petitioner,*

VS.

**KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,**
*Respondent.*

**On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The Association of Trial Lawyers of America, by Edward J. Kionka, Sheldon S. Cohen and Michael F. Colley, its attorneys, respectfully move for leave to file its brief as Amicus Curiae in the instant case.

The motion of The National Association of Railroad Trial Counsel for leave to file an amicus curiae brief has already been allowed, and its brief is on file. In its motion, the Railroad Trial Counsel states that respondent Liepelt refused consent. This statement is not accurate.

Attorneys for respondent Liepelt told the Railroad Trial Counsel that there would be no objection to their motion if they would similarly consent to the filing of an amicus curiae brief on behalf of The Association of Trial Lawyers of America. The Railroad Trial Counsel declined to so agree. Defendant has refused consent for the filing of this brief.

The Association of Trial Lawyers of America is a national association composed of lawyers regularly engaged in the trial and appeal of all types of contested matters, as well as sitting judges, law professors, lawyer-administrators, and other lawyers, whose membership now numbers approximately 35,000. This Association, through its appropriate officers and committees, has authorized its participation in this cause as amicus curiae.

This Association seeks to represent in this litigation the interests of all persons who have been or will be injured, and the survivors of those who have been or will be killed, as a direct and proximate result of the negligence of a railroad, whether they be railroad employees or members of the general public. The interest of the Association arises both from the national ramifications of this decision and from its desire to speak for the many individual citizens who are or will become interested in the outcome of this case.

It is the Association's position that it ill behooves a tortfeasor who has caused a workman's death to ask the courts to spend precious time and resources litigating the deceased's hypothetical future tax liability, all for the purpose of transferring to the tortfeasor the tax benefit which Congress sought to give the victim. The injection of this issue into a personal injury trial simply does not withstand any rational cost-benefit analysis.



WHEREFORE, The Association of Trial Lawyers of America prays that this Court grant its motion to file its brief Amicus Curiae.

Respectfully submitted,

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## BRIEF AMICUS CURIAE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

## SUMMARY OF ARGUMENT

The trial court correctly refused to give an instruction that plaintiff's damages are not subject to income taxation. Such an instruction would be confusing and misleading. It is not an instruction on the law applicable to the evidence, but is rather a cautionary instruction based upon the assumption that the jury will be guilty of misconduct. As such, it is and ought to be discretionary

with the trial court. Almost all jurisdictions which have considered this question have refused to require such an instruction. Moreover, this is a matter as to which state law controls, since the instruction does not go to the merits of the case or to the measure of damages, but rather is an administrative or cautionary instruction. As to such instructions, state law, not federal law, controls.

The trial court also correctly refused to permit evidence or argument concerning the extent to which the decedent's post-death earnings would have been reduced by income taxes. The lower federal courts are split, some favoring the *McWeeney* rule which allows such taxes to be taken into account only when the decedent's income was beyond the lower or middle reach of the income scale, and others refusing to allow such evidence in any case. The majority of state courts reject such evidence, as does the Restatement (Second) of Torts. To allow such evidence would nullify the tax benefit which Congress has given the recipients of personal injury damages, and would introduce into the trial of an F.E.L.A. case a complex, confusing collateral issue involving improper speculation about future facts and tax laws. And rejection of this evidence does not, in fact, result in plaintiff being overcompensated.



## ARGUMENT

### I.

### LOWER STATE AND FEDERAL COURTS SHOULD CONTINUE TO HAVE DISCRETION TO REFUSE TO GIVE A JURY INSTRUCTION ON THE NON-TAXABILITY OF PLAINTIFF'S DAMAGES.

Defendant's contentions with respect to the income tax aspects of (1) plaintiff's damages and (2) decedent's earnings are two separate and distinct issues and must be treated as such.

Defendant and Amicus Railroad Trial Counsel contend that since the damages awarded to plaintiff (Kandythe J. Liepelt, as administrator of her deceased husband's estate on behalf of herself and her children) are not subject to federal income taxation, this fact should have been disclosed to the jury.

As defendant and the railroad amicus necessarily concede, the overwhelming majority of jurisdictions which have considered this issue have refused to mandate such an instruction. This is because there are strong policy reasons against such a requirement. Under these circumstances, defendant should have the burden of persuasion that the reasons supporting such an instruction are so compelling that this Court should require it be given as a matter of federal law. Clearly, no such necessity has been shown.

Defendant's argument presumes that the jury would probably be guilty of misconduct; that the jury would take it upon itself to add a sum to the damages properly computed in accordance with the instructions because of its erroneous assumption that Mrs. Liepelt will have to pay income tax on the amount of her judgment. We sub-

mit that there is no basis whatsoever for the assumption that the jury will disregard its oath, disregard the evidence, and disregard the court's instructions. Moreover, an instruction such as requested by defendant would be bewildering at best, and could itself lead the jury into error in its computations. The jury below heard no evidence concerning any tax consequences to Mrs. Liepelt of its award, nor would such evidence be relevant in any case. It heard no argument by counsel explaining the tax consequences of its judgment, and any such argument, even if permitted, would be collateral and confusing. The jury probably would not understand that the purpose of the instruction is to prevent its misconduct, and would be at a loss as how to take this fact into consideration. Such an instruction might even lead the jury into erroneously *reducing* the award arrived at in *proper* manner, following the letter of the substantive instructions concerning damages. Thus, the potential mischief inherent in any such instruction far outweighs any likelihood of the misconduct which it is supposed to prevent. Defendant has not shown and cannot show any basis in reality which would justify this instruction. Its sole basis is the rather unseemly speculation concerning jury misconduct.

In addition, any such instruction would be anomalous. The function of instructions is to tell the jury the law applicable to the evidence presented. The proposed instruction does no such thing. It does not tell the jury how to arrive at their verdict, but rather paternalistically admonishes them not to engage in misconduct. Instructions of this type have no place in a jury trial. They place the trial court in the position of revealing to the jury its fear that the jury may do wrong, and cautioning against such wrongdoing. The likelihood is that either



the jurors would rightfully resent such an assumption about their behavior, or else the jurors would misunderstand the purpose of the instruction and thereby miscalculate the award.

If we are to give instructions such as the one proposed by defendant, then logically we cannot stop at the instruction proposed. Using this same rationale, we should also tell the jury not to take into account the fact that the investment income earned on the award is taxable to the widow. We should also tell the jury that attorney's fees should not be considered in making the award, since it is far more likely that the jury would consider the impact of attorney's fees than that it would consider the taxability of the award. Similarly, the jury should also be told that it should not consider the fact that the defendant is a wealthy corporation, or that it may be insured, since it is reputed that juries also take these facts into consideration. Under this rationale, the jury should also be told not to consider the fact that the payment of the award is a deductible expense by the defendant on its income tax return. Other examples of jury misconduct which might affect its award, and therefore which would be proper subjects of cautionary instructions, can be imagined. To mandate an instruction such that is suggested by the defendant would logically compel the opening of the door to a whole range of instructions designed to prevent the consideration of extraneous factors by the jury. This is undoubtedly one of the major reasons why the overwhelming majority of courts which have considered this question have refused to require that it be given. Annot., 63 A.L.R. 2d 1393, § 6 and supplements. See, e.g., *Hall v. Chicago & N.W. Ry.*, 5 Ill. 2d 135, 125 N.E.2d 77 (1955); *Michaud v. Steckino*, 390 A.2d 524, 534-36 (Me. 1978).

Defendant claims that the issue whether such an instruction should be given is one of *federal* law, and therefore this court must adopt a rule which will be binding in all F.E.L.A. cases tried in state and federal courts. This is simply not correct. Assuming for the sake of argument that the *measure of damages* in an F.E.L.A. case may be determined by federal law, the form and content of jury instructions are clearly matters of procedure as to which the law of the forum controls. *Central Vt. Ry. v. White*, 238 U.S. 507 (1915); *Kansas City So. Ry. v. Leslie*, 238 U.S. 599 (1915); Annot., 79 A.L.R. 2d 553 (1961) and supplements. The instruction in question is not substantive, but is rather a general cautionary instruction as to which each jurisdiction traditionally has been given discretion to fashion its own instructions. The cases cited for this proposition in the brief of defendant and the railroad amicus are distinguishable on this basis. Thus, as to this proposed instruction, there is no federal question or federal interest sufficient to require intervention by this Court. Traditionally, the lower state and federal courts have been given discretion to instruct the jury on non-substantive matters as they see fit. Defendant has not shown why instructions cautioning the jury against misconduct should be an exception to this rule.

As previously noted, various courts, state and Federal, have passed upon this issue. Among the many decisions on this point, almost all have held either that (1) it is error to give such instruction, or (2) the trial court has absolute discretion in the matter, and it is not error either to give or not to give such an instruction. 1 S. Speiser, Recovery For Wrongful Death § 8:14 (2d ed. 1975); Annot., 63 A.L.R. 2d 1393, § 6. Defendant and the railroad amicus apparently could find among all of these decisions only two federal courts and two state courts which have ruled



that such an instruction must be given if requested. *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284 (9th Cir. 1975); *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245, 1248-52 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971); *Tenore v. NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613 (1975); *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952).

A good example of a recent case which discusses in detail and reaffirms the established rule is *Michaud v. Steckino*, 390 A.2d 524, 534-36 (Me. 1978).

Moreover, Illinois authority expressly requires that no such instruction be given. *Hall v. Chicago & N.W. Ry.*, 5 Ill. 2d 135, 125 N.E.2d 77 (1955); *Raines v. New York Central R.R.*, 51 Ill. 2d 428, 283 N.E.2d 230 (1972), *cert. denied*, 409 U.S. 983; *Saunders v. Norfolk & W. Ry.*, 54 Ill. App. 3d 307, 12 Ill. Dec. 21, 369 N.E.2d 518, 525 (1977).

We submit that defendant and the railroad amicus have failed to show either a sufficient federal interest, or a compelling federal need, for this court to intervene and strike down the well-established rule that such an instruction is not required.

## II.

## THE ILLINOIS COURTS PROPERLY REFUSED TO INJECT THE ISSUE OF INCOME TAXATION INTO THE COMPUTATION OF PLAINTIFF'S DAMAGES.

Defendant and the railroad amicus also argue that defendant should have been permitted to show, by direct evidence and cross-examination, the extent to which decedent's future earnings might have been reduced by income taxes which he would have paid on his earnings. In effect, they contend that the proper measure of

damages is decedent's *net* or "take-home" pay, and not his gross wages which defendant would have paid to him but for his death.

Here, too, defendant and amicus contend that federal law controls. However, this precise issue has yet to be decided by this Court. Generally, the courts have held that the admissibility of evidence is a procedural question as to which state law controls, unless the application of state procedural law would impair the federal remedy. See Annot., 79 A.L.R. 2d 553 (1961) and supplements. In the instant case, defendant argues that the rulings of the state courts below did not *impair* plaintiff's remedy, but rather *enhanced* it. Arguably, therefore, state law should be controlling on this issue. Nevertheless, for the sake of argument, we will assume that federal law governs the determination of this issue.

This particular question has engendered much debate and some division of authority, although the majority of courts have held in favor of the plaintiff.

Among the Circuit Courts of Appeals, the Second, Sixth, Seventh, Ninth and Tenth Circuits appear to follow the so-called *McWeeney* rule, discussed in the other briefs herein, which holds that the income tax effects on future earnings must *not* be taken into account unless and until the plaintiff's or deceased's earnings are beyond the "lower or middle reach of the income scale."

*Second Circuit: McWeeney v. New York, N.H. & H. R.R.*, 282 F.2d 34, 38-39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965); *Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).



*Sixth Circuit: Petition of United States Steel Corp.*, 436 F.2d 1256, 1273-74 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971); *Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978).

*Seventh Circuit: Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967); *Chapman v. United States*, 541 F.2d 641, 656 (7th Cir. 1976), *rev'd on other grounds on rehearing en banc*, 575 F.2d 147, *cert. denied*, ..... U.S. ....., 99 S.Ct. 251 (1978).

*Ninth Circuit: Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284 (9th Cir. 1975); *Felder v. United States*, 543 F.2d 657, 665 (9th Cir. 1976).

*Tenth Circuit: Sanchez v. Denver & Rio Grande W. R.R.*, 538 F.2d 304 (10th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Deweese v. United States*, 576 F.2d 802 (10th Cir. 1978).

On the other hand, the First, Third, Fourth, Fifth and Eighth Circuits hold that damage awards are *not* to be reduced by *any* projected future income taxes.

*First Circuit: Boston & Me. R.R. v. Talber*, 360 F.2d 286, 291 (1st Cir. 1966); cf. *Kennett v. Delta Air Lines, Inc.*, 560 F.2d 456, 462-64 (1st Cir. 1977).

*Third Circuit: Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 177-78 (3d Cir. 1977).

*Fourth Circuit: Gardner v. National Bulk Carriers, Inc.*, 221 F. Supp. 243 (E.D. Va. 1963), *aff'd*, 333 F.2d 676 (4th Cir. 1964); *Plant v. Simmons Co.*, 321 F. Supp. 735 (D. Md. 1970); *Scruggs v. Chesapeake & Ohio Ry.*, 320 F. Supp. 1248, 1251 (W.D. Va. 1970). But *cf. Mosley v. United States*, 538 F.2d 555 (4th Cir. 1976) (No. Carolina law; non-jury case).

*Fifth Circuit: Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236-37 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 839 (1975).

*Eighth Circuit: Chicago & N.W. Ry. v. Curl*, 178 F.2d 497, 502 (8th Cir. 1949); *Raycraft v. Duluth, M. & I.R. Ry.*, 472 F.2d 27, 33 (8th Cir. 1973); *Rouse v. Chicago, R.I. & P. Ry.*, 474 F.2d 1180, 1183 (8th Cir. 1973); *Duncan v. St. Louis-San Francisco Ry.*, 480 F.2d 79, 87 (8th Cir.), *cert. denied*, 414 U.S. 859 (1973).

While not all of these are F.E.L.A. cases, the federal and state courts have generally not distinguished between F.E.L.A. and non-F.E.L.A. cases on this issue and have treated them interchangeably.

Among the states, the overwhelming majority of decisions have held that personal injury and wrongful death awards for future lost earnings, including those in F.E.L.A. cases, are *not* to be reduced by any sum based upon projected future income taxes. In other words, damages are measured by the plaintiff's or decedent's gross pay, not his net or "take home" pay. See Annot., 63 A.L.R. 2d 1393 (1959) and supplements; 1 S. Speiser, Recovery For Wrongful Death §§ 8:12, 8:13 (2d ed. 1975).

For an excellent opinion analyzing the law nationally as of 1975, and discussing the rationale for the majority rule, see *Huddell v. Levin*, 395 F. Supp. 64, 84-91 (D.N.J. 1975), *vacated and remanded*, 537 F.2d 726 (3d Cir. 1976).

The majority view is adopted by the influential Restatement (Second) of Torts, § 914A(2), which provides:

> "The amount of an award or tort damages is ordinarily not diminished because of the fact that although the award is not itself taxed, all or a part of it is to compensate for the loss of future benefits which would have been subject to taxation."

See Comment *b*.



Defendant's arguments on this point can be condensed into a single premise—that the failure to deduct from the award the amounts which decedent would have paid in income taxes results in his survivors receiving a greater sum than they would have received if decedent had not been killed, but rather had continued to work and earn his salary.

Of course, we know that, in reality, this will never occur, since plaintiff must pay her attorneys' fees and the expenses of litigation out of her award. Defendant argues that this is a matter between plaintiff and her attorneys, and may not properly be considered in assessing her damages. However, this argument is inconsistent with defendant's argument that the purpose of the Federal Employers' Liability Act is compensatory. If the purpose of the Act is to compensate decedent's survivors to the fullest extent possible, then it would seem just as relevant to consider one extraneous factor affecting that compensation—plaintiff's certain liability for attorneys' fees—as another—the tax benefit conferred upon such awards by Congress. Either both are relevant or neither is. Nowhere it is written that the courts cannot take *both* these factors into account in fashioning a rule which will go as far as possible to achieve the Congressional purposes of (1) providing full compensation under the F.E.L.A. and (2) conferring the tax benefit provided in § 104(a)(2) of the Internal Revenue Code.

Nevertheless, for purposes of discussion, let us examine the superficial appeal inherent in defendant's argument, apart from the question of attorney's fees. Let us go further and assume a case in which the income tax consequences would be significant. It is not decisive merely to assert that plaintiff's damages (not considering the deduction for her attorneys' fees and ex-

penses) will produce a net income to decedent's survivors which is hypothetically higher than they would have received had he survived. If it were decisive, then the majority rule which now exists could not be justified. This factor must be balanced against other practical, administrative, and equitable considerations which most courts have found to compel the rejection of defendant's position.

The rationale for the majority rule is fully and amply discussed in the authorities cited, as well as in plaintiff's brief herein, and we will not fully explicate it here. Briefly, the reasons supporting the rule which rejects the injection of tax considerations into an F.E.L.A. case are as follows.

1. *Complexity.* To introduce this issue would necessarily involve the court and jury in the decision of complex tax issues, far more complex than projecting and discounting future earnings, already a difficult enough task. Tax computations are notoriously difficult, and become increasingly so as the income in question goes above the lower brackets. Moreover, such computations could not be limited to the federal income tax, but would have to include state and local income taxes and F.I.C.A. taxes. Defendant argues that such computations are not so difficult as to be beyond the jury's ability, at least with the help of expert testimony. This may be doubted, considering the extent to which ordinary taxpayers seek professional help in these matters. Moreover, this argument is self-defeating, since it imposes upon virtually every plaintiff the burden of expert testimony. Such a burden ought not be required for so nebulous a benefit to defendant. In addition, defendant's argument assumes that the tax issues will be uncontested. In reality, we know that this will not occur.



Plaintiff's tax expert will take the jury through one set of complex calculations and reach one result; defendant's expert will present another set of equally complex calculations and reach a different result. Of necessity, then, the jury will be put in the position of resolving a difficult tax issue—surely a task which Congress never intended, and which the courts ought not to impose. For this reason alone, the benefit for which defendant argues is simply not worth the cost.

2. *Speculation.* The calculation of future tax consequences of the decedent's future earnings would require numerous speculative assumptions about decedent's circumstances and about the structure of future tax laws. Defendant argues the certainty of future taxes. That may be true, but their *amount* and the *method* of their computation surely will be different in the future, just as these things have frequently changed in the past. Whatever the experts' assumptions about these variables, the only thing which is certain is that they will be more or less wrong. Defendant argues that the same is true of such matters as decedent's future earnings, which are already part of the basis for the computation of damages. But there are many fewer variables in this computation, and therefore less error. Moreover, the necessity of calculating future *earnings* is far greater than the benefit of the far more complex and speculative calculation of future *taxes.* The latter calculation cannot be justified by any rational cost-benefit analysis.

3. *Collateral Issues.* By reason of the foregoing, the trial can easily become sidetracked with the consumption of considerable time on the trial of a secondary issue, the estimated income taxes on decedent's future earnings. We must assume that this issue will be con-

tested. It would hardly seem a proper allocation of judicial and juror resources to require the parties to try a tax case along with an F.E.L.A. case. Neither the F.E.L.A. nor the Internal Revenue Code should be construed to encompass so absurd a result. An F.E.L.A. juror should not be required to adjudicate tax issues.

4. *Deprival of Tax Benefit.* To permit the deduction of an amount for future income taxes from the award for lost earnings would deprive plaintiff of the tax benefit given her by Congress in the Internal Revenue Code. See Comment, 30 La. L. Rev. 672, 685 (1970); *Huddell v. Levin*, 395 F. Supp. 64, 84-91 (D.N.J. 1975), *vacated and remanded*, 537 F.2d 726 (3d Cir. 1976). Just as plaintiff's attorneys' fees are a matter between her and her attorneys, and are of no concern to defendant, so are the income taxes for which decedent might have been liable a matter between the taxpayer and the governmental taxing authority, and of no legitimate concern to defendant. In other words, income tax is *res inter alios acta* so far as the tortfeasor is concerned.

5. *Tax Policy Considerations.* Since 1918, Congress has consistently exempted amounts received as damage awards, such as the one in issue here, from gross income for federal income tax purposes. Revenue Act of 1918, § 213(b)(6), Pub. L. 65-254. Little doubt exists at present that Congress has the power to make such recoveries taxable if it so desires. Obviously, Congress does not wish, and has not wished, to reduce damage payments by the amount of income taxes. As one commentator has pointed out, this provision is

> "based on public policy and not on strict tax logic. . . . This reflects the humane desire not to burden those already injured. . . ." Note, Taxation of Damage Recoveries From Litigation, 40 Cornell L. Q. 345, 346 (1955).



Defendant's position, if upheld, results in an anomalous situation. If damage payments were taxable, a portion of the damage award would be paid to the federal government to be used for the *public's* benefit. By exempting damage awards from taxation, Congress, in effect, has made a direct public subsidy of these taxes to those persons who have suffered damages. It is clear from defendant's argument that it expects a jury to reduce the amount of the award by the amount of income taxes that the damaged party would otherwise pay into the public fisc. But if the damage award is reduced, it is the *tortfeasor* who benefits, not the injured party or the general public. In the absence of a specific statutory provision, it should not be assumed that Congress intended to benefit tortfeasors by exempting damage payments from Internal Revenue taxes.

Defendant's position thus raises the question, on whom and to what extent benefits should be conferred in connection with the compensation for damages on account of personal injuries: the injured party, the tortfeasor, or the general public (by making such payments taxable). Congress has consistently chosen to confer such benefits on the injured party. It is submitted that after 61 years of consistent action, any change in this policy should be left to the Congress.

6. *Analogy To Collateral Source Rule.* If no deduction is made for future taxes, plaintiff will receive the tax benefit. If a deduction is made, that benefit will be awarded to the defendant. As between the injured party and the tortfeasor, it is far more just and fair that the injured party have this benefit than the tortfeasor, especially since plaintiff's award will already be reduced by expenses and attorneys' fees. Defendant argues that it will receive no "benefit," since it already has to pay

plaintiff's judgment and, in addition, another employee for the services which decedent would have rendered. This argument misses the mark. Congress already has conferred the tax benefit. But for that benefit, defendant would have no argument here. Thus, the question remains whether that benefit shall be given to the injured party or to the tortfeasor. Manifestly, it should go to the injured party.

We will not attempt here a comprehensive analysis of all the state court cases which support the majority rule. However, the following recent decisions are illustrative of the continuing vitality of that rule.

In *Lumber Terminals, Inc. v. Nowakowski*, 36 Md. App. 82, 373 A.2d 282, 291-92 (1977), the court stated:

> "The more general view, supported directly or inferentially by a decided majority of cases, is that in fixing damages for loss of past earnings or for impairment of future earning capacity because of personal injuries, the income tax consequences of the injury and award should not be taken into consideration. * * * We think that Maryland should be in accord with the majority view. Without distinguishing whether accrued or prospective, the award of damages should be based upon the plaintiff's gross earnings or earning capacity and should not be reduced because of any income tax savings which may result to the plaintiff from the fact that the damages will be exempt from income tax.
>
> "Based upon appellant's argument as to the availability of information about tax consequences, it seems to have concluded that the only persuasive reason for exclusion of tax consequences was that given by some courts, i.e., that the amount of one's future income tax liability is too conjectural or speculative a factor. . . . And we agree that future tax liability is conjectural to a large extent; however, far more persuasive to us is the fact that the matter is extraneous to the issues being tried. Taxes are strictly between plaintiff as taxpayer and the government as collector, and are of no legitimate concern of the defendants. . . . Although many defendants contend that because such recoveries are not taxable, a windfall is thus provided injured plaintiffs, that argument has a reverse effect. If an award were decreased by estimated taxes, the windfall would be one for the defendant, who has far less claim to it than the wage earner. The tax exemption was intended by Congress to benefit the injured party, not the wrongdoer."



In *Seely v. McEvers*, 115 Ariz. 171, 564 P.2d 394, 397 (Ariz. App. 1977), the court stated:

> "Although courts are divided on this question, the majority view appears to be that income tax consequences should not be taken into consideration in arriving at damages for loss of future earnings or for impairment of future earning capacity. Rather the award of damages should be based upon a plaintiff's gross earnings. The courts have generally reasoned that the amount of taxes is too conjectural and would not only unduly complicate and confuse the damages issue but overshadow the basic issue of liability. . . .
>
> "We adopt the majority rule and hold that gross pay and not net or 'take home' pay is the proper basis for computing loss of future earnings, and that evidence of income taxes or deductions should not be allowed for the purpose of reducing the amount of damages."

In *McGee v. Burlington Northern, Inc.*, ..... Mont. ....., 571 P.2d 784, 790-91 (1977), the court held that an instruction concerning the impact of income taxes on the damage award was properly refused, stating:

> "We reaffirm our prior holding that future income tax liability is an improper consideration in formulating an award for loss of future earnings."

And in *Rediker v. Chicago, R.I. & P. R.R.*, 1 Kan. App. 2d 581, 571 P.2d 70, 76 (1977) (review by Kansas Supreme Court denied), *writ of cert. dismissed*, 435 U.S. 982, 99 S.Ct. 1635 (1978), the court stated:

> "Appellant next complains of the trial court's refusal to permit cross-examination of appellee's actuarial witness concerning the impact of income taxation upon his computation as to the amount of appellee's future earnings. The matter of income taxes has arisen in personal injury suits in two ways: Should future taxes be deduced from future wages in determining damages from the deprivation of future earnings, or should a jury be told the fact that an award of damages is not subject to income tax? Many jurisdictions, including our own, have dealt with the issue. The vast majority holds that a jury should not be told of this exemption, ruling either that income tax consequences cannot be considered or that cautionary instructions should not be given concerning nontaxability of the award. See Annot.: Damages—Considering Income Taxes, 63 A.L.R. 2d 1393, and Later Case Service. Reasons given include:
>
> "(1) Income tax liability or saving is a matter not pertinent to the damages issue, being a matter of concern between the plaintiff and the taxing authority.
>
> "(2) The amount of income tax which might become due on one's prospective earnings in future years is too conjectural to be considered in fixing damages.
>
> "(3) To admit income tax matter into a lawsuit for damages would be unduly complicated and confusing.
>
> "(4) If the jury were to mitigate damages by reason of income tax exemption, legislative intent to give the injured party a tax benefit would be nullified.



> "The matter was thoroughly explored in *Spencer v. Eby Construction Co.*, 186 Kan. 345, 350 P.2d 18. In concluding that in a personal injury action the incidence of federal or state income taxation is not a proper factor to be considered by the jury in making an award of damages (Syl. par. 1) the court took into account all the reasons mentioned above. Appellant's assertion of error cannot be sustained."

Defendant argues that, in the event this Court should not allow the deduction of projected future income taxes in *all* cases, at least it should adopt the *McWeeney* rule and allow such deduction when the projected future taxable income of decedent falls above the "lower or middle" ranges. Even the adoption of the *McWeeney* rule would require affirmance here. Decedent's projected earnings at time of trial of approximately $16,000 hardly place him above the "lower or middle" income range. And as to future projected increases, it is a fair assumption that these increases will parallel those of all other wage earners and that future tax brackets will be similarly adjusted, so that decedent's future wages would *always* be within the lower or middle ranges.

We submit, however, that when the benefit to defendant of taking into account future income taxation—a benefit whose equities are weak—is balanced against the practical, administrative and equitable factors discussed above, the benefit to defendant is not justified by the burdens, costs and inequities it would produce. Those burdens, costs and inequities so far outweigh the questionable equity for which defendant argues as to require its rejection in all cases.

## CONCLUSION

For the foregoing reasons, amicus curiae The Association of Trial Lawyers of America respectfully submits that the judgment should be affirmed.

Respectfully submitted,

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